Soon Tiek Development Sdn Bhd v Lim Hoo Kim & Ors

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-02(NCVC)(W)-1189–07 OF 2016
DAVID WONG, HAMID SULTAN AND UMI KALTHUM JJCA
6 OCTOBER 2017

Civil Procedure — Limitation — Time — Sale and purchase agreement — Delivery of vacant possession — Whether respondent's claims time barred — Whether limitation period postponed due to appellant's fraud — Limitation Act ss 6(1)(a) & 29(a), (b)

The respondents had purchased properties in a commercial complex developed by the appellant. Pursuant to cl 24 of the sale and purchase agreements ('the SPAs'), vacant possession of the properties was to be delivered 36 months from the date of the SPAs, failing which the appellant shall be liable to pay the respondent liquidated ascertained damages ('LAD'). Vacant possession of the properties was delivered on 2 October 2002 ('delivery of vacant possession'). The respondent however, filed claims for LAD on 13 February 2014. The learned High Court judge had allowed the LAD claims to the respondents which resulted in the present appeal. The issues for the court's consideration were: (a) whether the respondent's claims were time barred by s 6(1)(a) of the Limitation Act 1953 ('the Act'); and (b) whether the limitation period was postponed as there was fraud on the part of the appellant.

Held, allowing the appeal with costs of RM30,000, setting aside the orders of the High Court and ordering the deposit to be refunded to the appellant:

(1) When the respondents in their pleadings stated in no uncertain terms that vacant possessions of the properties were delivered on 2 October 2002, they in fact were figuratively speaking 'hoisted with their own petard' in that it had dismantled their own case. Their cause of action must have started to run on that date of vacant possession. In this case, the claims were filed by the respondents on 13 February 2014 which was some 12 years after the date of delivery of vacant possession and was obviously time barred (see paras 21 & 25).

(2) On the allegation of fraud made by the respondents, the court was not convinced that there was in fact fraud. The architect's reports were made known to the respondents prior to the delivery of vacant possession. The respondents chose to sit on their rights until 2014. The respondents did not deny that they were aware of legal suits being filed against the

appellants. A witness of the respondent conceded going to court to determine the issue of the architect's report could not be a concealment of fraud (see paras 22–23).

[Bahasa Malaysia summary

Responden-responden telah membeli hartanah di kompleks komersial yang dibangunkan oleh perayu. Berikutan klausa 24 perjanjian jual beli ('PJB'), milikan kosong hartanah adalah mesti diberikan 36 bulan dari tarikh PJB tersebut, jika gagal perayu akan bertanggungjawab untuk membayar kepada responden ganti rugi yang ditentukan dan ditetapkan ('LAD'). Milikan kosong hartanah tersebut diberikan pada 2 Oktober 2002 ('pemberian milikan kosong'). Responden walau bagaimanapun, memfailkan tuntutan-tuntutan untuk LAD pada 13 Februari 2014. Hakim Mahkamah Tinggi yang bijaksana telah membenarkan tuntutan-tuntutan LAD kepada responden-responden yang mana mengakibatkan rayuan ini. Isu-isu untuk pertimbangan mahkamah adalah: (a) sama ada tuntutan-tuntutan responden dihalang masa oleh s 6(1)(a) Akta Had Masa 1953 ('Akta'); dan (b) sama ada tempoh had masa ditangguhkan kerana terdapat fraud oleh pihak perayu.

Diputuskan, membenarkan rayuan dengan kos sebanyak RM30,000, mengenepikan perintah-perintah Mahkamah Tinggi dan memerintahkan deposit dibayar balik kepada perayu:

(1) Apabila responden-responden dalam pliding mereka menyatakan dengan jelas dan tegas bahawa milikan kosong hartanah tersebut diberikan pada 2 Oktober 2002, mereka pada hakikatnya adalah secara kiasan bercakap 'hoisted with their own petard' di mana ia telah memansuhkan kes mereka sendiri. Kausa tindakan mereka mesti mula berjalan pada tarikh milikan kosong tersebut. Dalam kes ini, tuntutan-tuntutan difailkan oleh responden-responden pada 13 Februari 2014 yang mana 12 tahun selepas tarikh pemberian milikan kosong dan jelas dihalang (lihat perenggan 21 & 25).

(2) Atas dakwaan fraud yang dibuat oleh responden-responden, mahkamah tidak yakin bahawa sebenarnya terdapat fraud. Laporan-laporan arkitek dimaklumkan kepada responden-responden sebelum pemberian milikan kosong tersebut. Responden-responden memilih untuk tidak berbuat apa-apa atas hak mereka sehingga tahun 2004. Responden-responden tidak menafikan yang mereka sedar mengenai tindakan undang-undang yang difailkan terhadap perayu-perayu. Saksi responden bersetuju datang ke mahkamah untuk menentukan isu laporan-laporan arkitek tidak boleh menjadi penyembunyian fraud (lihat perenggan 22–23).]

Notes

For cases on limitation of time, see 2(3) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 6445–6450.

Cases referred to

Datuk Syed Kechik bin Syed Mohamed & Anor v The Board of Trustees of The Sabah Foundation & Ors and another application [1999] 1 MLJ 257; [1999] 1 CLJ 325, FC (refd)

Soon Teik Development Sdn Bhd v Liew Tuo Chee & Ors [2011] 6 MLJ 350; [2011] 9 CLJ 311, CA (refd)

Legislation referred to

Limitation Act 1953 ss 6(1)(a), 29(a), (b)
Rules of Court 2012 O 14A

Appeal from: Civil Suit No 22NCVC-63–02 of 2014 (High Court, Kuala Lumpur)

Loh Siew Cheang (Yap Mong Jay and Verene Tan Yeen Yi with him) (Cheang & Ariff) for the appellant.

Harpal Singh Grewal (Harwinder Kaur and Nahwinah Selvaraj with him) (AJ Ariffin Yeo & Harpal) for the respondents.

David Wong JCA (delivering judgment of the court):

INTRODUCTION

[1] This appeal relates substantially to claims for liquidated ascertained damages ('LAD') in respect of delays in delivering vacant possession of properties purchased by the respondents from the appellant.

[2] The learned judge at the High Court had allowed the LAD claims to the respondents which resulted in this appeal.

[3] We heard the appeal and after due consideration to respective submissions of counsel, we allowed the appeal and now give our reasons.

FACTUAL BACKGROUNDS

[4] The respondents had purchased properties in a commercial complex known as Endah Parade developed by the appellant. It is a term of the sale and purchase agreements via cl 24 that vacant possession of the properties is to be given 36 months from the date of the sale and purchase agreements. Clause 14 reads as follows:

Time for Handing Over of Vacant Possession

24.1 Subject always to any extension of time as may be allowed by the Project Architect or Project Engineer and provided that the Purchaser shall have paid to the Vendor all Instalments of the Purchase Price and all and any other sums under this Agreement as and when due and payable, the Property, without any alterations and/or additions to the Property as stipulated in Clause 17 hereof shall be completed by the Vendor and vacant possession thereof shall be handed over to the Purchaser within thirty six (36) calendar months from the date of this Agreement (hereinafter referred to as 'the said date').

24.2 If the Vendor fails to hand over vacant possession of the Property to the Purchaser on the said Date, the Vendor shall pay to the Purchaser agreed liquidated damages to be calculated from day to day at the rate of ten per centum (10%) per annum on such portion of the Purchase Price of the Property as the Purchaser shall have paid to the Vendor from the said Date to the date of the notice from the Vendor to the Purchaser requesting the Purchaser to take vacant possession of the Property to be computed and paid by the Vendor after completion of the Property and after payment of the full Purchase Price by the Purchaser. The Purchaser hereby acknowledges that save for the provisions contained herein the Purchaser shall not be entitled to any rights or remedies against the Vendor for whatsoever loss suffered by the Purchaser resulting from such delay.

[5] Clause 25.1 of the sale and purchase agreements provides the manner in which delivery of vacant possession is to be done. For clarity the aforesaid section reads as follows:

Manner of Delivery of Vacant Possession

25.1 Upon the issuance of a Certificate by the Vendor's Architect certifying that the construction of the Property has been practically completed in accordance thereof and provided that the Purchaser shall have paid all monies payable under this Agreement and shall have observed and performed the terms and covenants on his part herein contained, the Vendor shall permit the Purchaser into possession of the Property PROVIDED THAT such possession shall not give the Purchaser the right to occupy and the Purchaser shall not occupy the Property until such time as the Certificate of Fitness for Occupation for the Commercial Complex and/or the Property is issued.

25.2 Upon the expiry of fourteen (14) days from the date of a notice from the Vendor requesting the Purchaser to take possession of the Property, whether or not the Purchaser has actually entered into possession or occupation of the Property, the Purchaser shall be deemed to have taken delivery of vacant possession whereupon the Vendor shall cease to be responsible howsoever for any loss or damage to the Property and/or the fixtures and fittings thereon/therein.

[6] It is undisputed that the appellant obtained the certificate of fitness for occupation on 2 October 2002.

[7] The respondents in February 2014 filed the writ and the statement of claim premised on the appellant's failure to deliver vacant possession of the properties within the stipulated period of 36 months, breach of the appellant's advertisement brochure, damages arising from the appellant's misrepresentation and damages for diminution of the value of the respondent's properties.

[8] The crux of the appellant's defence at the trial in the High Court was one of limitation in that the respondents' claims are statute barred by the Limitation Act 1953.

THE HIGH COURT DECISION

[9] The learned judge dismissed the limitation defence of the appellant in the following manner:

> Samada tuntutan Plaintif untuk mendapatkan LAD terhalang oleh proviso di bawah Akta Had Masa 1953?
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> Mahkamah mendapati tuntutan Plaintif untuk mendapatkan LAD tidak terhalang oleh proviso di bawah Akta Had Masa 1953.
>
> Dapatan Mahkamah adalah bahawa masa bermula sebaik sahaja Mahkamah Persekutuan memutuskan bahawa terdapat fraud apabila Defendan 1 menyerah notis milikan kosong hartanah dengan menggunakan Laporan Progres Arkitek yang dikenali sebagai Jadual Pembayaran Kemajuan.

OUR GROUNDS OF DECISION

[10] Learned counsel for the appellant from the outset informed the court that the success of the appeal is premised whether he can succeed in convincing us that the learned judge had erred in failing to appreciate that the respondents' claims were indeed time barred.

[11] Learned counsel for the respondents however raised objection to learned counsel for the appellant in raising this point of limitation on the ground that it was caught by the concept of res judicata. What had happened before the trial of the case, the appellant had taken an application under O 14A ('encl 50') to determine the following issues:

(a) whether the respondents' claim with respect to the appellant's alleged liability to pay LAD to the respondents is barred by limitation under the Limitation Act 1953? and

(b) whether the respondents' claim with respect to the appellant's alleged misrepresentation is barred by limitation under the Limitation Act 1953?

[12] Enclosure 50 was dismissed by the learned judge and since there was no appeal against that dismissal, learned counsel for respondent submitted that the appellant's counsel cannot raise this issue of limitation before us. We then enquired what was the learned judge's rationale in dismissing encl 50 as the learned judge had dealt with this issue in her grounds of decision and there is no statement stating that she had dealt with this issue in encl 50 and was merely repeating her earlier decision and reasons. Respective counsel were not able to show the notes of the learned judge on encl 50. Our rationale for our request for the notes of proceeding is simply that encl 50 could have been dismissed on the ground that O 14A was not appropriate and we formed the view that that was actually the reason as the learned judge had made that ruling in her grounds of decision after trial. Hence, we allowed learned counsel for the appellant to ventilate that issue before us.

[13] There was no dispute that the respondents' claims were based on the fact that the vacant possession for the properties was only delivered to the respondent on 2 October 2002. In view of this, the appellant's submission was simple in that when the respondents' suits were started on 13 February 2014, which was some 12 years later, the same were statute barred. Section 6(1)(a) is relied upon and it reads as follows:

> (1) Save as hereinafter provided the following actions shall not be brought after the expiration of six years from the date on which the cause of action accrued, that is to say —
>
> (a) actions founded on a contract or on tort;
>
> (b) actions to enforce a recognisance;

[14] Learned counsel for the respondents however submitted that there had been a postponement of the limitation period and relied on s 29(a) and (b) of the Limitation Act which states as follows:

> Where, in the case of any action for which a period of limitation is prescribed by this Act, either —
>
> (a) the action is based upon the fraud of the defendant or his agent or of any person through whom he claims or his agent; or
>
> (b) the right of action is concealed by the fraud of any such person as aforesaid; or
>
> (c) ...
>
> the period of limitation shall not begin to run until the plaintiff has discovered the fraud or the mistake, as the case may be, or could with reasonable diligence have discovered it:
>
> Provided that nothing in this section shall enable any action to be brought to recover, or enforce any charge against, or set aside any transaction affecting, any property which —

A (i) in the case of fraud, has been purchased for valuable consideration by a person who was not a party to the fraud and did not at the time of the purchase know or have reason to believe that any fraud had been committed; or

(ii) ...

B

[15] The learned judge sustained the submission of the respondents and relied on s 29(a) and (b) of the Limitation Act and the Federal Court's order dated 27 November 2012 in finding that there was a postponement of the limitation period.

C

[16] Learned counsel for the appellant submitted that the grounds of the learned judge was not a 'speaking' one in that there was a lack of judicial consideration of the circumstances in which the Federal Court order was made and the effect of the same. Further, she, it was submitted, did not take into consideration of the respondents' pleadings that vacant possession of the properties was delivered on 2 October 2002.

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[17] We found merits in the appellant's submission and our reasons were these.

E

[18] First, we looked at the Federal Court's order dated 27 November 2012. From the chronology of events set out in the submission of learned counsel for the respondents, it showed that there were several legal suits involving the appellant and various purchasers of the properties in Endah Parade. The respondents in this case were a different set of purchasers of properties of Endah Parade from the other legal suits. The common factor among these legal suits was the claim for LAD. The Federal Court's order dated 27 November 2012 was the last court order in respect of the other legal suits and it related to Originating Summons S-3–24–1639 of 2006 and Civil Appeal No W-02–794 of 2008. Hence, learned counsel for the respondents submitted that the limitation period only started to run as that was when litigation between the appellant and the other purchasers finally ended and that there was finality of finding of fraud by the courts. That fraud related to the alleged concealment of fraud relating to the use of the architect's progress report as the certificate of practical completion ('CPC').

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[19] The Federal Court's order was only a dismissal of a leave application by the appellant to appeal against the Court of Appeal's decision and when leave was dismissed there was no finding at all by the Federal Court. This is made clear in the case of *Datuk Syed Kechik bin Syed Mohamed & Anor v The Board of Trustees of The Sabah Foundation & Ors and another application* [1999] 1 MLJ 257; [1999] 1 CLJ 325 where the Federal Court, through the judgment of Edgar Joseph Jr FCJ, said as follows:

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> Having said that, we hasten to add, in the words of Lord Diplock speaking in the House of Lord in Modern *Engineering v Gilbert-Ash* [1974] AC 689 at pp 715–716: '*Refusal of leave to appeal does not imply approval by this House of a judgment sought to be appealed against.* That judgment carries the same authority as any other unappealed judgment of the Court of Appeal — neither more or less'. With this statement of principle we respectively agree. The natural tendency, therefore, to claim that a judgment of the Court of Appeal which has been the subject of an unsuccessful application for leave carries greater authority than one which has gone unchallenged, must be resisted.

[20] Hence the manner in which learned counsel relied on the Federal Court's order is neither here or there.

[21] When the respondents in their pleadings stated in no uncertain terms that vacant possessions of the properties were delivered on 2 October 2002, they in fact were figuratively speaking 'hoisted with their own petard' in that it had dismantled their own case. Their cause of action must have started to run on that date of vacant possession. To borrow a phrase, once limitation sets in, just like *rigor mortis*, the process was irreversible. It is now time for the mortician, so to speak, as the logical conclusion to the analogy.

[22] As for the allegation of fraud, we were not convinced that there was in fact fraud. What had happened in the other suits was basically a determination by the various courts of the issue of whether or not the appellant's contention that the use of the architect's progress reports amounted to a CFC can be sustained. The architect's reports were known to the respondents prior to 2 October 2002 and they chose to sit on their rights until 2014. Further there was no denial that they were aware of legal suits being filed claiming for LAD.

[23] Furthermore, as pointed out by learned counsel for the appellant, the respondents' own witness conceded that going to court to determine the issue mentioned and the considerations in the previous paragraph could not be a concealment of fraud. At p 1195 of *Jld* 2(6) of the appeal record, this was what transpired between counsel and witness:

> LSC: Do you agree going to court to determine whether this progress report, I mean you look at all is contains shows the building is practically completed or not and etc? Going to court to determine it, is it fraud? As a matter of fact, is it fraudulent?
>
> Lee: No it is not fraud

Anyway, in anyone's view, that would be a reasonable finding. With respect, the learned judge never considered this aspect of the factual matrix before her.

[24] In one of the legal suits filed, namely Originating Summons S1–24–454 of 2005, the Court of Appeal had considered this very point of limitation. The Court of Appeal's decision and grounds are reported under *Soon Teik Development Sdn Bhd v Liew Tuo Chee & Ors* [2011] 6 MLJ 350; [2011] 9 CLJ 311. The factual matrix is the same here. The issue there is also the same as here. It was submitted that there was no delay of vacant possession of the properties premised on the contention that the architect's certificate served on the purchasers equated to a certificate of practical completion for the purposes of delivery of vacant possession. This contention was rejected by the High Court and Court of Appeal which held as follows:

> Under cl 25 of the SPA, it was incumbent upon the defendant to produce a copy of the architect's CPC. The said certificate issued by the architect was not a CPC envisaged by cl 25. Similarly the notice on the schedule of payment was not a certificate that the construction of the units purchased by the plaintiffs had been completed for vacant possession to be delivered. The learned judge was right in ruling that the architect's schedule of payment progress was not the CPC but plainly a notice of the schedule of payment. Furthermore, there was no provision which allowed the defendant to issue a vacant possession notice without the CPC.

[25] What was of vital relevance in that case was that there was a plea of limitation as in this case. It was also submitted there that the claims were time barred on the ground that the completion dates of the sales and purchase agreements were 26 October 1998 and 27 September 1998 respectively. This was rejected by the Court of Appeal on the ground that the relevant time when causes of action arose was the date of the CPC namely 2 October 2002 and when the claims were filed on 8 March 2005, they were well within the six-year period. In this case, the claims were filed on 13 February 2014 well after 2 October 2002. That was obviously time barred.

CONCLUSION

[26] We found that this was a case where appellate intervention was called for as, with respect, there was a failure of judicial appreciation of the totality of the evidence before the trial court.

[27] For reasons stated above, we allowed the appeal with costs in the sum of RM30,000 for here and below. We also set aside the orders of the High Court and ordered the deposit be refunded to the appellant.

Appeal allowed with costs of RM30,000; orders of High Court set aside and deposit refunded to appellant.

Reported by Fatin Mohd Ismail